



---

Volume 60 | Issue 4

Article 13

---

June 1958

## Damages--Loss of Earnings--Federal Income Tax

R. G. P.

*West Virginia University College of Law*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Legal Remedies Commons](#)

---

### Recommended Citation

R. G. P., *Damages--Loss of Earnings--Federal Income Tax*, 60 W. Va. L. Rev. (1958).

Available at: <https://researchrepository.wvu.edu/wvlr/vol60/iss4/13>

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

ever, the courts generally have been disinclined to utilize this power in cases of improper remarks because of the severity of the penalty. See Note, *The Imposition of Disciplinary Measures for the Misconduct of Attorneys*, 52 COLUM. L. REV. 1039 (1952). Perhaps a compromise method could be found in contempt proceedings which would make available a wide range of sanctions. Contempt is a flexible, easily applied discipline, and has in fact been used to deter attorneys in both civil and criminal cases. See *e.g.*, *Sacher v. United States*, 343 U.S. 1 (1952); *Pace v. United States*, 336 U.S. 155 (1949).

J. O. F.

---

DAMAGES—LOSS OF EARNINGS—FEDERAL INCOME TAX.—Action by administrator for wrongful death of decedent who was passenger in defendant's auto which collided at intersection with truck driven by one codefendant and owned by defendant truck line. *Held*, that trial court properly instructed jury to consider offsetting factor of probable income taxes on decedent's probable lifetime net earnings in assessing reasonable compensation for loss caused by destruction of decedent's earning capacity. *Floyd v. Fruit Industries*, 136 A.2d 918 (Conn. 1957).

The principal case represents an effort on the part of the forward-looking and learned Connecticut court to advance a principle unanswerable—*restitutio in integrum*—in the face of practical and mechanical difficulties as well as the prevailing line of authority. Prior American decisions have conceded that an unjust enrichment may accrue to the plaintiff when tax liability is not deducted from personal injury recoveries; however, they have regarded the calculation of future tax liability as too remote and speculative for submission to a jury. See, *e.g.*, *Southern Pac. Co. v. Guthrie*, 186 F.2d 926 (9th Cir. 1951); *Pfister v. City of Cleveland*, 96 Ohio App. 185, 113 N.E.2d 366 (1953).

The objections to the principal case may conveniently be categorized into four groups. First, that consideration of intricate tax liability is a matter too complex and technical as well as speculative for consideration by a jury. See, *e.g.*, *Rouse v. New York C. & St. L. Ry.*, 349 Ill. App. 139, 110 N.E.2d 266 (1953); *Stokes v. United States*, 144 F.2d 83 (2d Cir. 1944). Second, that effective tax rates in this country fluctuate and the liability of an individual is governed by such intangibles as age, number and extent of personal deductions, etc. See, *e.g.*, *Dempsey v. Thompson*, 363 Mo. 339,

251 S.W.2d 42 (1952); *Combs v. Chicago, St. P., M. & O. Ry.*, 135 F. Supp. 750 (N.D. Iowa 1956). Third, *res inter alios acta*. The tortfeasor's liability should not be affected by a benefit conferred upon the plaintiff from a collateral source, *e.g.*, continuation of wages. MAYNE, DAMAGES 151 (11th ed. 1946); *Majestic v. Louisville & N.R.R.*, 147 F.2d 621 (6th Cir. 1945). Fourth, the principal case would impose upon the plaintiff an indirect tax burden which the legislature will not directly impose. Note, 69 HARV. L. REV. 1495 (1956).

The first of these objections regarding the speculative character of future tax liability involves an attempt to weigh factors no more conjectural than the life expectancy of the plaintiff, his chances to resume a productive endeavor, or any number of matters inherent in any personal injury action. Note, 69 HARV. L. REV. 1495 (1956). Moreover, no responsible person could suggest that evidence concerning the future tax liability of the plaintiff would be more technical or complex than the testimony of many orthopedic surgeons.

The fact that tax rates fluctuate and the tax liability of the plaintiff is subject to the extent of his personal deductions is a more formidable objection. However, even this problem disappears when deducting income tax from estimated prior earnings, which tax may be calculated with great precision. Moreover, there is nothing uncertain or remote about the incidence of future federal income tax, only the rates are subject to speculation. It may fairly be stated that the tax rates and extent of personal deductions are no more indeterminate than the posture of an individual's overall future earning potential. The attempt on the part of a jury to resolve the multiplicity of fluid factors involved in the determination of a lump sum estimate of future earning potential is fraught with relevant conjectural considerations, all of which are critical problems. The future tax liability of the plaintiff is no less important. "The trial of an action for damages is not a scientific inquest into a mixed sequence of phenomena, or of an historical investigation of the chapter of events . . . it is a *practical inquiry*." *Weld-Blumdel v. Stephens*, (1920) A.C. 986. As a practical man and a federal income taxpayer, the average juror is profoundly aware of the concept of "take home pay" and the incidence of federal income taxes. Morris, *Should Juries in Personal Injury Cases Be Instructed That Plaintiffs Recoveries Are Not Income Within the Meaning of Federal Tax Laws?*, 3 DEFENSE COUNSEL J. 3 (1958). Therefore, any "practical inquiry" into the loss suffered upon the destruction of earning

capacity should take cognizance of the fact that: "For all practical purposes, the only usable earnings are net earnings after payment of such taxes." *Floyd v. Fruit Industries*, 136 A.2d 918, 925 (1957).

The objection that the tax liability of a plaintiff is *res inter alios acta*, is specious; the assessment of damages often involves matters *res inter alios acta*. When a business or professional man's earning capacity is destroyed, the courts do not base recovery upon gross income, but deduct the expenses of rent, salaries, etc., to arrive at his net income and properly measure his actual loss. *Jegen v. Berger*, 77 Cal. App. 2d 1, 174 P.2d 489 (1956); Mason, *Damages and Income Tax*, 4 BUSINESS L. REV. 242, 249 (1957). Likewise, a person with the most limited knowledge of accounting concepts can readily appreciate the necessity of deducting income tax liability to arrive at the projected net earning capacity and hence, the projected net loss to be compensated. The aforementioned well-known expenditures are no less *inter alios acta* than the liability of an individual to pay income taxes. All such outgoings must be considered.

The last objection—that the principal case imposes a tax burden that the Congress has declined to impose directly—is, upon mature reflection, reduced to serious question. To understand this matter, one must comprehend that the INT. REV. CODE OF 1954, § 104(A)(2), puts personal injury recoveries in some category other than income, by specifically excluding damages for such injuries from gross income. Wages and salaries are, of course, an essential part of gross income. What, then, is the distinction between an award for future earnings and the earnings as they might accrue? The answer lies in the fact that "recoupment on account of such losses is not income since it is not derived from capital, from labor or from both combined." *Edward H. Clark*, 40 B.T.A. 333 (1939), citing *Merchant's Loan & Trust Co. v. Smietanka*, 255 U.S. 509 (1920). When the capacity to earn is destroyed, the reparation is of capital, not income. The plaintiff is to be compensated for the destruction of the source giving rise to future income, as sometimes measured by estimated future income. Indeed, it is well known that the plaintiff need not be presently employed to recover for the destruction of future earning capacity. *Blacktin v. McCarthy*, 42 N.W.2d 542 (Minn. 1957). Prospective gross earnings of an individual as reduced by his expenses including prospective income taxes, most accurately reflect the net earning potential of a plaintiff. Compensation of the plaintiff for the destruction of his earning capacity

can best be effected by the use of future net earnings as the measure of damages. This method is perfectly consistent with the Internal Revenue Code exemption of personal injury recoveries, the purpose of which is to avoid taxing *as income*, that which was already the plaintiff's: his earning capacity. The consideration of future tax liability imposes no burden upon the plaintiff; and certainly not one that Congress has refused to impose directly.

It remains to examine the overwhelming consideration favoring the rule in the principal case.

*Restitutio in integrum*; upon this canon, hangs most of the law of damages. The ultimate concern in any personal injury action must be to measure, as accurately as possible, the harm sustained by the plaintiff and to compel the defendant to compensate the plaintiff for his injury. In a larger sense, this is the rationale of the principal case.

Not only the Connecticut court, but also the highest tribunal of the British Commonwealth, the English House of Lords, has adopted the position that the future income tax liability of plaintiff may properly be deducted from an award for future earnings. *British Transport Comm'n v. Gourley*, A.C. 185 (2 W.L.R. 41-H.L.), 3 All E.R. 796 (1956). The only tort commentators of any particular note who have, as yet, expressed themselves on this problem, have approved the principle put forth in the *Gourley* and *Floyd* cases. "If the plaintiff gets, in tax free damages, an amount on which he would have had to pay taxes if he had gotten it as wages, then the plaintiff is getting more than he lost." 2 HARPER & JAMES, TORTS § 25.12 (1956).

A distorted view of this subject will, no doubt, lead some to view the problem from a frame of reference in which a benefit is conferred on a tort-feasor by allowing him to abate the damages for which he would otherwise be liable. However, this is no matter of escape from, or even reduction of liability; rather, the question is one of accurate assessment of liability. No responsible person would suggest that the defendant should be compelled to pay damages over and above that which the plaintiff has actually suffered by reason of the defendant's wrongdoing.

We may only hope that the West Virginia court will not be susceptible to the maudlin suggestion that consideration of future income tax liability is a scheme for indemnity companies to escape liability.

R. G. P.